(23)

IN THE

Supreme Court of the United States

October Term 1945
No. 442

EDWARD SCHLECTER,

Petitioner,

against

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause, by the Attorney-General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, rendered March 14, 1945, affirming an order of a Special Term of the Supreme Court of the State of New York, held in and for Wayne County, New York, which dismissed a writ of habeas corpus issued on behalf of petitioner against John F. Foster, as Warden of Auburn Prison at Auburn, New York, where-

in he was and is incarcerated (R. 4-6*). The Special Term wrote an opinion (R. 27-29) and the Appellate Division affirmed without opinion. Application to the Appellate Division for leave to appeal to the Court of Appeals of the State of New York was denied and subsequent application to the Court of Appeals for leave to appeal to that Court was likewise denied.

The Facts

The petitioner was indicted by the grand jury of Westchester County for the crime of having in his possession burglar's tools, having previously and on December 27, 1923 been convicted of the crime of burglarly, third degree and was convicted thereof on December 9, 1940, by verdict of a jury (R. 13-17). Thereafter the District Attorney filed an information, pursuant to section 1943 of the Penal Law, accusing petitioner of having been thrice previously convicted of felonies, one of which was the aforesaid conviction of December 27, 1923 (R. 23-24), and, after proper proceedings had upon this information, and on December 9, 1940, he was sentenced by the Westchester County Court, pursuant to section 1942 of the Penal Law, to a term of from fifteen years to life (R. 13-14).

This petition is based upon the claim that petitioner was not accorded due process of law.

POINT I

Petitioner did not exhaust his remedies in the State courts and there has been no decision of the merits by the highest court of the State in which a decision could be had.

The Constitution of the State of New York (Art. VI, § 7), defining the jurisdiction of the Court of Appeals, provides:

* Record references throughout are to pages of the Record in the New York Supreme Court, Appellate Division, Fourth Department.

> "Appeals may be taken to the court of appeals in the classes of cases enumerated in this section. * * *.
> In civil cases and proceedings as follows:
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification."

If the petitioner is correct in his contention that the case presents a question under the Constitution of the United States, he was entitled to appeal to the Court of Appeals as of right. He did not avail himself of that right and there has been no decision by the Court of Appeals upon that constitutional question.

Section 589 of the Civil Practice Act of New York authorizes appeals to the Court of Appeals by permission of the Appellate Division or by permission of the Court of Appeals, but only from an order or judgment which is not appealable as a matter of right.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final

order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y., Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case, no appeal has been taken to the Court of Appeals.

POINT II

The petition presents no substantial Federal question.

The double jeopardy provision of the Fifth Amendment is, as this Court has many times held, without application to action by the States.

> *Barron* v. *Baltimore* (1833), 7 Pet. 243;
> *Twining* v. *New Jersey* (1908), 211 U. S. 78;
> *Palko* v. *Connecticut* (1937), 302 U. S. 319, 322;
> *Feldman* v. *United States* (1943), 322 U. S. 487, 490.

Petitioner's reliance in this Court, accordingly, is upon the due process clause of the Fourteenth Amendment (Petition, p. 3).

The rule is, we believe, that to constitute a denial of due process under that clause, the State action must violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

> *Palko* v. *Connecticut, supra,* p. 325;
> *Brown* v. *Mississippi,* (1936), 297 U. S. 278, 285;
> *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 105;
> *Hebert* v. *Louisiana* (1926), 272 U. S. 312, 316;
> *Rogers* v. *Peck,* (1905), 199 U. S. 425, 434.

Petitioner is an old offender. He has been found guilty of four serious crimes against the laws of the State of New York. For the fourth and last of these crimes, he has been sentenced to an indeterminate sentence, the minimum of which is fifteen years and the maximum his natural life (R. 14), pursuant to §1492 of the Penal Law of the State, quoted on page 4 of the petition herein.

"The propriety of inflicting severe punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."

Mr. Justice Hughes in *Graham* v. *West Virginia* (1911), 224 U. S. 616, at p. 623.

The last of petitioner's crimes would have constituted a misdemeanor under the laws of the State, rather than a felony, except for his previous conviction of a felony (Penal Law, § 408, quoted at p. 3 of the petition). That gave rise to the contention in the State courts that it was not the legislative intention that a previous felony conviction should be used to raise a later crime from a misdemeanor to a felony and also to treat the last conviction as a conviction of a felony for the purpose of imposing increased punishment under the fourth offender statute and to the contention that it would be unconstitutional to do so. The question of legislative intention has been decided adversely to the petitioner by the State courts.

We think that an altogether sufficient answer to the petitioner's contention is that the infliction of the increased punishment upon him would not have violated any fundamental principle of justice if such increased punishment had, by statute, been made to depend upon two previous

felonies plus a misdemeanor, or even of three previous misdemeanors. This Court, we are sure, is not concerned with the extent of the term of imprisonment imposed by the States for violation of their laws; certainly not when the punishment is inflicted upon confirmed criminals who repeatedly flout their laws.

At the time petitioner committed his fourth offense, he knew, or should have known, that it would constitute a felony and would be the fourth felony which he had committed. Certainly it is not shocking to the principles of justice and conscience that he was treated accordingly.

CONCLUSION

It is submitted that this cause presents no question within the jurisdiction of this Honorable Court, and that the petition should be denied accordingly.

Dated: October 15, 1945.

Respectfully submitted,

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